Office-Supreme Court, U.S.
FILED
AUG 18 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 139

NATIONAL PLATE AND WINDOW GLASS COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

BERNARD WEISS
Attorney for Petitioner
136 East 57th Street,
New York 22, N. Y.

LOUIS BENDER
Attorney for Petitioner
170 Broadway,
New York 7, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

NATIONAL PLATE AND WINDOW GLASS COMPANY, INC., *Petitioner*, v. UNITED STATES OF AMERICA, *Respondent*.	No. 139

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

1. Respondent's brief does not dispute petitioner's contention that upon the filing of a petition in the Tax Court of the United States to redetermine a deficiency by the Commissioner that:

(a) The Tax Court has exclusive jurisdiction to determine the tax (Section 7442 and 6214(a) of the Internal Revenue Code of 1954).

(b) specific power in aid of such exclusive jurisdiction exists in the Tax Court under Section 7456 and is reflected in Tax Court Rules 44 and 45, regulating the issuance of subpoenas for books and records and the taking of testimony.

(c) The Chief Counsel of the Internal Revenue Service and his delegates are the only authorized persons to appear in a Tax Court proceeding on behalf

of the Commissioner of Internal Revenue and not a Special Agent. Indeed, respondent specifically states "concededly the Secretary or his delegate had no right to determine any additional deficiency for 1953 after the petition covering that year had been filed with the Tax Court." (R. B. 12) Obviously this concession removes the very purpose for the application of Section 7602 of the Internal Revenue Code of 1954, since the purpose of that general section is to enable the Commissioner to determine the tax and issue the deficiency notice based thereon. Equally obvious is that the express statutory power given to *only* the Chief Counsel and his delegate to represent the Commissioner of Internal Revenue in the Tax Court prohibits the Special Agent from issuing process under Section 7602 of the Internal Revenue Code of 1954 in aid of a Tax Court proceeding.

2. The absence of an express provision in Section 6212(c) of the Internal Revenue Code of 1954 limiting the application of Section 7602 of the Internal Revenue Code of 1954 when a Tax Court proceeding exists as to a given year cannot defeat the evident purpose of Section 6212(c) to provide the Tax Court with the power to control all phases of the tax litigation, otherwise Section 6212(c) and the other provisions giving the Tax Court exclusive jurisdiction are rendered ineffective and inconsistent with Section 7602 of the Internal Revenue Code of 1954 under the interpretation of the U. S. Court of Appeals for the Second Circuit.

Under these circumstances Section 6212(c) which is a specific enactment dealing with cases docketed before the Tax Court must prevail and limit the application of the general provisions of Section 7602 of the Internal Revenue

(R. B.) Respondent's Brief.

Code of 1954 when the application of Section 7602 would be in conflict with and in derogation of the provisions contained in Section 6212(c). See *MacEvoy* v. *United States*, 322 U. S. 102, 107; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *United States* v. *Chase*, 135 U. S. 255, 260-261.

3. By limiting the issue in this case to the petitioner's fiscal year ended in 1953, respondent admits that the petitioner was correct when it maintained that the records for the years 1954 to 1956 had been examined and the records for the year 1953 were not necessary to determine the tax for those other years. (see Petition for Rehearing below, R. 76, 77, 78). Indeed, as further pointed out in the Court below, the Commissioner had already issued a statutory notice of deficiency based upon such examination for the fiscal year 1954 in which no fraud was alleged (Petition for Rehearing in Court below, R. 77, 78). In this respect the Court below was incorrect in its statement that the 1953 records were needed for subsequent years and in its citation of *Norda Essential Oil & Chemical Co.* v. *United States*, (C. A.-2) 230 F(2d) 764, as applicable.

4. Respondent, in a footnote to his brief (R. B. 12) alleges that the petitioner has abandoned the contention "that the mandatory production of its records for the fiscal year 1953 would constitute a violation of its constitutional right of freedom from unreasonable search and seizure." This belief of the respondent is probably due to oversight for in the very petition for a writ of certiorari in this proceeding Question 1(a) specifically poses the constitutional question. (P. B. 2).

5. Respondent errs when he states, under Argument 2 (R. B. 13) that (a) Special Agent Waldman's affidavit is

---

(R.) Record.
(P. B.) Petitioner's Brief.

sufficient showing of the probability of fraud, and (b) the petitioner did not raise in the Court below the question to what extent belief of fraud must be shown.

With regard to (a) above, Waldman's affidavit is a self-serving administrative statement without any indicia for an Appellate Court to over-rule a trial court's finding to the contrary.

With respect to (b) above, the petitioner submits the issue was raised both orally and upon brief in the U. S. District Court for the Eastern District of New York as well as in the Court below and is also contained in the petition for rehearing before the Court below (R. 78, 79). The Record also discloses that the degree of "fraud", if any, had been raised in the motion to quash (R. 53, 56).

6. Respondent in his recital of the facts attempts to create the impression that petitioner permitted a "cursory examination" of its 1953 records subsequent to the filing of a petition in the Tax Court of the United States and thereafter refused a second inspection of the records under 7605(b) of the Internal Revenue Code of 1954. Petitioner contended below that no direct examination of its 1953 books was ever made but that the inspection referred to by respondent as having occurred on February 28, 1957 pertained only to the 1954 to 1956 records. At no time after the filing of the petition in the Tax Court of the United States on February 7, 1957 did the petitioner allow an inspection of its 1953 records for the purpose of determining its tax liability for that year. Petitioner took the position, after the Internal Revenue Service refused to make a timely examination (R. 58) and thereafter issued a sham, frivolous and arbitrary statutory notice of deficiency in an attempt to toll the statute of limitations (R. 62-64), that the Tax Court of the United States had exclusive jurisdiction and therefore the Commissioner's summons issued by a Special

Agent when the case was already at issue in the Tax Court of the United States was illegal.

7. Respondent misinterpreted petitioner's reliance on Section 7605(b) of the Internal Revenue Code of 1954 as limiting the application of Section 7602, assuming that 7602 had not already been made inapplicable by Section 6212(c) under the facts of this case. Petitioner's contention is not based upon a mere cursory examination of one account in connection with a third party checkup, but upon the fact that the statutory notice of deficiency was a frivolous, sham, and arbitrary act of the Commissioner to evade the limitations provided in Section 6501(a) of the Internal Revenue Code of 1954; or alternatively, the use of the petitioner's accountant's work sheets, as well as data obtained from other sources, constitute a sufficient initial examination to require a Commissioner's letter as provided by Section 7605(b). Petitioner's contention on this point is set forth in further detail under Point 5 in the petition for a writ of certiorari.

Conclusion

For the reasons hereinbefore stated; petitioner's petition for a writ of certiorari should be granted.

Respectfully,

BERNARD WEISS
Attorney for Petitioner
136 East 57th Street,
New York 22, N. Y.

LOUIS BENDER
Attorney for Petitioner
170 Broadway,
New York 7, N. Y.